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November 18, 1999

VIA HAND DELIVERY

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Federal Communications Commission
Office of Secretary

Ms. Magalie Roman Salas
Secretary
Federal Communication Commission
The Portals - TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

RE: [redacted]

Dear Ms. Salas:

Enclosed please find the original and four copies of the Emergency Petition for Relief and Supplemental Comments of Fox Television Stations, Inc., in the above-captioned docket.

If you have questions about this filing, please do not hesitate to contact me at the number listed above.

Sincerely,

Bruce Sokler

Bruce D. Sokler

BDS:jw

Enclosures

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List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
1998 Biennial Regulatory Review --	)	[redacted]
Review of the Commission's Broadcast	)	
Ownership Rules and Other Rules	)	
Adopted Pursuant to Section 202	)	
of the Telecommunications Act of 1996	)	

To: The Commission

EMERGENCY PETITION FOR RELIEF AND SUPPLEMENTAL COMMENTS OF FOX TELEVISION STATIONS, INC.

FOX TELEVISION STATIONS, INC.

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Its Attorneys

Dated: November 18, 1999

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SUMMARY

Almost four years ago, the Federal Communications Commission was directed by Congress in the 1996 Telecommunications Act to review its broadcast rules every two years and to repeal or modify any regulation it determines to be no longer in the public interest as a result of competition. Fox submits that this congressional directive, as well as fundamental principles of administrative law, requires **immediate** FCC review and elimination of the national station ownership cap. Restrictions on television station ownership cannot be justified on the basis of economic theory, competition policy or on any public interest policy goal. These restrictions are, in fact, counterproductive. Continuous and dramatic changes in the media marketplace, together with the FCC's own actions in relaxing the local broadcast and cable ownership rules, make rapid review of broadcast ownership rules such as the national cap even more economically and competitively imperative.

The media marketplace is reinventing itself on an almost daily basis. Fox files its Emergency Petition for Relief and Supplemental Comments to document the significant changes that have occurred in the marketplace just in the 20 months since the Commission initiated the biennial review required by the 1996 Act. These marketplace changes further undermine any rationale for continued restrictions on national station ownership. Not only do broadcasters face increasingly intense competition for viewers, advertising revenue and programming, but they also face significant consolidation among the media in each of these three arenas. These formidable competitors, which include cable operators, cable networks, direct broadcast satellite services and internet companies, are able to take advantage of a far less regulated environment to expand their reach and achieve economies of scale. At the same time, broadcasters hamstrung

by the national cap are prevented from exploiting comparable economies, efficiencies and opportunities.

The FCC correctly recognized the implications of increased competition when it recently relaxed its local broadcast ownership and cable horizontal ownership rules. If the FCC extends the logic underlying these regulatory changes to the national TV ownership rule, it should quickly and decisively conclude that the cap must be eliminated.

Fox relies here on an economic study, "Old Rules and New Rivals: An Examination of Broadcast Television Regulation and Competition," prepared by Professor Michael L. Katz of the University of California at Berkeley, who was formerly Chief Economist of the Federal Communications Commission, that has been submitted in this Docket. Based on his rigorous analysis of competition and other marketplace trends, Dr. Katz concludes that the national broadcast ownership rule "has no public interest justification," "now harms the public interest rather than protects it," and should be eliminated. He concludes that the inefficiencies caused by the national ownership restriction ultimately harm the public interest by artificially raising the cost of station operations, reducing program quality and raising the cost of advertising. Dr. Katz contends that the rule may weaken free, over-the-air broadcasting by limiting the return broadcast networks can realize on their programming investments, thereby driving them to direct more of their resources away from free television and towards subscription services. We know from real world experience that Dr. Katz is correct. Significant investments that might have flowed to broadcasting ten years ago are now increasingly flowing to cable or to the Internet.

The Commission's own recent decisions to relax both its local broadcast ownership restrictions and restrictions on horizontal ownership of cable systems further underscore the inequity and capriciousness of retaining national limits on broadcast station ownership. In both instances, the Commission concluded that increased competition and marketplace changes warranted relaxation of the regulations at issue. In fact, in his statement accompanying the local broadcast ownership decision, Chairman Kennard cited the dramatic changes in the video marketplace over the last 30 years in support of the proposition that :

> **...[W]e need to provide broadcasters with flexibility to seize opportunities and compete in the increasingly dynamic media marketplace. These items will not only help them compete with the growing number of alternative media. They will also help preserve free local broadcast service.**

The FCC's own analysis and reasoning in those proceedings, if applied to the 35% national audience cap, compel its complete elimination.

Consistent with statements by the Commission that date back to 1984, the Commission acknowledges in its recent Local Ownership Television Review Order, that national ownership limits do little to promote diversity. Having found sufficient evidence of increased competition and changed market conditions to support relaxation of ownership restrictions at the local level, where the competition and diversity interests are most compelling, the Commission must acknowledge that those same market conditions warrant even greater relaxation of ownership restrictions at the national level, where the Commission itself has acknowledged that those interests are implicated far less substantially – if they exist at all.

In the Cable Horizontal Order, the Commission recognized that the number of homes actually being served by a cable operator (*i.e.,* subscribers) more accurately reflects its impact on competition and diversity than its potential reach (*i.e.*, homes passed). In the broadcast context, however, a station owner's potential audience continues to be the yardstick for measuring its market share regardless of its actual share of the viewing audience. Thus, all the homes in a station owner's market are counted against the 35 percent cap even though a strong station can expect, at best, to be viewed by only one out of seven homes (or less than 15% of the potential audience) in that market on average during a given day. In contrast, a cable operator's reach is now measured only by its actual subscribers, despite the Commission's findings that the average cable operator is likely to be viewed in two out of every three homes within its market and have more than an 80% share of the multichannel households in that market.

In short, having moved to an actual viewership yardstick in the cable context, fashioned rules that explicitly take into account the competition faced by cable operators, and provided cable with the opportunity to expand into new markets as it loses share to competitors, there is no justification for failing to undertake dramatic reforms in the less-concentrated broadcast area. As Dr. Katz concludes in a supplemental study comparing the TV national cap to the new cable horizontal ownership rules (which is attached hereto), the Commission's recent relaxation of the cable rules constitutes "one more piece of evidence that it is in the public interest to abolish or substantially relax the broadcast television national multiple ownership rule."

Whatever original justification might have existed for limiting a single broadcaster's national ownership reach has evaporated in the face of dramatic increases in competition and marketplace trends that include consolidation of broadcasters' competitors. The urgent need to eliminate the outdated national cap becomes clearer with each passing day and with each new Commission decision. The Commission should grant this Petition and act immediately to eliminate this outdated and counterproductive regulation.

CERTIFICATE OF SERVICE

I certify that the foregoing Emergency Petition for Relief and Supplemental Comments of Fox Television Stations, Inc. was served this 18th day of November 1999, via hand delivery upon:

Office of Commissioner Harold Furchtgott-Roth Federal Communications Commission 445 12th Street, SW Room 8A302C Washington, DC 20554	Office of Commissioner Susan Ness Federal Communications Commission 445 12th Street, SW Room 8B115H Washington, DC 20554
Office of Commissioner Gloria Tristani Federal Communications Commission 445 12th Street, SW Room 8C302C Washington, DC 20554	Office of Commissioner Michael Powell Federal Communications Commission 445 12th Street, SW Room 8A204C Washington, DC 20554
Office of Chairman William Kennard Federal Communications Commission 445 12th Street, SW Room 8B201H Washington, DC 20554	Thomas Power Senior Legal Advisor Office of Chairman Kennard Federal Communications Commission 445 12th Street, SW Room 8B201 Washington, DC 20554
Marsha J. MacBride Legal Advisor Office of Commissioner Powell Federal Communications Commission 445 12th Street, SW Room 8A204 Washington, DC 20554	Helgi Walker Senior Legal Advisor & Chief of Staff Mass Media and Cable Matters Office of Commissioner Furchtgott-Roth Federal Communications Commission 445 12th Street, SW Room 8A302F Washington, DC 20554
Tom Krattenmaker Director of Research Office of Plans & Policy Federal Communications Commission 445 12th Street, SW Room 7C324 Washington, DC 20554	Susan L. Fox Deputy Chief Mass Media Bureau Federal Communications Commission 445 12th Street, SW Room 8B201 Washington, DC 20554

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David Goodfriend Federal Communications Commission 445 12th Street, SW Room 8B115 Washington, DC 20554	

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EXHIBIT 1

A COMPARATIVE ANALYSIS OF THE BROADCAST TELEVISION NATIONAL MULTIPLE OWNERSHIP RULE AND CABLE HORIZONTAL OWNERSHIP RULES

Michael L. Katz

18 November 1999

I. INTRODUCTION AND QUALIFICATIONS

1. My name is Michael L. Katz, and I declare as follows. I am the Edward J. and Mollie Arnold Professor of Business Administration at the University of California at Berkeley. I hold a joint appointment in the Haas School of Business Administration and the Department of Economics. I serve as Director of the Center for Telecommunications and Digital Convergence at the University of California at Berkeley. I have also served on the faculty of the Department of Economics at Princeton University. I received my A.B. from Harvard University *summa cum laude* and my doctorate from Oxford University. Both degrees are in Economics.

2. I specialize in the economics of industrial organization, which includes the study of antitrust and regulatory policies. I regularly teach courses on microeconomics, business strategy, and telecommunications policy. I am the author of a microeconomics textbook, and I have published numerous articles in academic journals and books. I have written articles on several issues, including network effects, antitrust policy enforcement, and telecommunications policy. Exhibit A lists all publications that I have authored or co-authored, with the exception of a few letters to the editor on telecommunications policy. I am a coeditor of the *Journal of Economics & Management Strategy*, and I serve on the editorial board of the *California Management Review.*

3. In addition to my academic experience, I have consulted on the application of economic analysis to issues of antitrust and regulatory policy. I have served as a consultant to both the U.S. Department of Justice and the Federal Communications Commission ("the Commission") on issues of antitrust and regulatory policy in telecommunications markets. I have served as an expert witness before state and federal courts, and I have provided expert testimony before a state regulatory commission as well as Congress. In 1994 and 1995, I served as Chief Economist

of the Commission. Since leaving the Commission, I have appeared before it at several public forums.

4. I have been asked by counsel for Fox Television Stations, Inc. to analyze the relationship between the rules governing national multiple ownership of broadcast television stations and the rules governing national multiple ownership of cable television systems. Drawing on my training and experience as an economist, my review of the facts, and my knowledge of the broadcasting and cable television industries, I find the following:

- Superficially, the broadcast television national multiple ownership rule and the cable horizontal ownership rules are similar. But, in fact, the rules use very different bases for calculating whether an owner exceeds the relevant cap.
- The industries to which the rules apply also are very different. A typical cable system has much greater *absolute* programming capacity and accounts for a much greater *share* of viewers and capacity in its local area than does a television station.
- Because of the differences both in how ownership is calculated and in the underlying industries, application of the superficially similar rules leads to very different effects in practice: The cable horizontal ownership rules allow for a much greater degree of concentration than does the broadcast television national multiple ownership rule.
- Under the current rules, cable ownership is much more concentrated at the national level than is broadcast ownership. By any reasonable measure, national ownership of broadcast television stations is highly fragmented and is not concentrated. Sinclair Broadcast Group, Inc.—the largest group owner measured in terms of the number of television stations controlled—owns fewer than five percent of U.S. commercial television stations. Fox Television Stations, Inc.—the largest broadcast television group owner measured by national reach—owns stations that on average are viewed by less than three percent of U.S. television households. Similarly, Fox owned and operated stations accounted for less than four percent of national broadcast television capacity for reaching viewers.
- The Commission recently found that allowing increased concentration of cable system ownership is in the public interest. This finding is one more piece of evidence that it is in the public interest to abolish or substantially relax the broadcast television national multiple ownership rule.

The remainder of this declaration explains the factual and logical analysis that leads to these conclusions.

II. BACKGROUND

5. Both cable multiple systems operators ("MSOs") and broadcast television station group owners are subject to national ownership limits. Broadcast television ownership is governed by the national multiple ownership rule, under which a single entity cannot control stations whose combined reach exceeds 35 percent of U.S. television households.[1] Cable television ownership is governed by the cable horizontal ownership rules, under which no cable operator can control systems serving more than 30 percent of all multichannel video-programming subscribers nationwide.[2] The Commission has found that this is effectively a 36.7 percent cap on U.S. cable households.[3]

6. On the surface, the broadcast and cable rules are similar. In each case, the ownership cap is intended to prevent a single owner from acting as a media gatekeeper by exercising market power as a buyer (so-called monopsony power) or by limiting viewer options.[4] And in each case, a single owner is not allowed to control distribution systems covering more than about a third of the households reached by the respective industries.

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1 47 CFR § 73.3555(e). When a group owner holds two licenses within a single Designated Market Area, that audience is counted only once for purposes of the national reach cap. See *In the Matter of Broadcast Television National Ownership Rules, Review of the Commission's Regulations Governing Television Broadcasting, and Television Satellite Stations Review of Policy and Rules,* Report and Order, released August 6, 1999, ¶ 1.

2 47 CFR § 76.503.

3 See *In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 and Horizontal Ownership Limits,* Third Report and Order, MM Docket No. 92-264 (*"Horizontal Ownership Third Report and Order"*), released October 20, 1999, ¶ 6.

4 For a summary of the rationale for the cable horizontal ownership rules see *Horizontal Ownership Third Report and Order,* ¶¶ 13-14. Proponents of the broadcast television national cap argue that it protects the public interest in several dimensions, including: (a) competition; (b) diversity; (c) minority ownership; and (d) localism. It is notable that promoting minority ownership and localism were not originally stated as rationales for the adoption of the national multiple ownership cap. See *In the Matter of Amendment of Section 73.3555 [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations,* Report and Order, released August 3, 1984, ¶ 17.

7. While they set similar numerical limits, the broadcasting and cable television ownership rules are in fact very different. A critical difference arises in how an owner's national share is calculated. Under the cable horizontal ownership rules, only actual cable subscribers—not all homes passed—are included in the calculation of whether an MSO meets the ownership cap. Under the broadcast television national multiple ownership cap, however, all homes reached or "passed" are counted against the cap. As the data discussed below will make clear, this distinction is an extremely significant one.

8. Moreover, because they apply to such dissimilar industries, even if the rules were the same, their effects would be very different. A typical television viewer can be reached through only one cable system, and that system offers scores of channels. In contrast, a typical television viewer can choose among several broadcast stations, each of which offers only one channel of programming. Consequently, even if a broadcast station owner controlled stations with 100 percent national reach, that owner would not be able to restrict the supply of independent programming to viewers or exercise significant monopsony power in the purchase of programming—there would be too many alternative outlets through which programmers and viewers could reach one another.

9. Both because the rules are not really equal, and because the industries to which they apply are dissimilar, the application of apparently equal limits to broadcast and cable television ownership allows much greater concentration in cable television than in broadcast television. The next section documents the differences between broadcast and cable television in greater detail and examines the implications for ownership concentration.

III. THE BROADCAST TELEVISION AND CABLE TELEVISION INDUSTRIES ARE VERY DIFFERENT

10. There are a number of differences between the broadcast and cable television industries. All of these differences indicate that concentrated national ownership raises greater competitive issues in the cable industry than in the broadcast television industry.

A. Cable Viewing Markets are Much More Concentrated than are Broadcast Viewing Markets

11. One of the important differences between the two industries is in the concentration of ownership. In order to determine the degree of ownership concentration, one must define the relevant markets. Once these markets have been defined, it is possible to calculate market shares if sufficient data are available. The calculated market shares often are used to provide an indication of the presence or absence of market power, although it is widely recognized that several other factors must be taken into account as well.

12. Relevant markets are defined along two dimensions: the scope of the products included and the geographic scope. A fundamental principle by which economists define the product scope of a market is to include two goods or services in the same relevant market if consumers view them as sufficiently close substitutes, and not include them in the same relevant market if consumers do not view them as substitutes.[5] Similarly, the central approach to geographic market definition is to include products available at two locations in the same relevant market if they are viewed by consumers as being substitutes for one another, and to place them in separate markets if consumers do not view them as substitutes.[6]

---

[5] See, for example, U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, April 2, 1992 (revised April 8, 1997) (*"Merger Guidelines"*) § 1.11, and *In the Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, Memorandum Opinion and Order, FCC 97-286 (*"NYNEX-Bell Atlantic Order"*), released August 14, 1997, ¶ 50.

[6] See *Merger Guidelines*, § 1.2, and *NYNEX-Bell Atlantic Order*, ¶ 50.

13. In terms of product scope, the Commission apparently considers broadcast television and multi-channel video programming distribution ("MVPD") to be separate and distinct relevant markets, for at least some purposes.[7] It is evident that the relevant product markets are no narrower than broadcast television and MVPD. There are good reasons to conclude that the product scope relevant for the analysis of the broadcast television national multiple ownership cap is broader than broadcast television.[8] Rather than debate the appropriate scope of product markets here, however, I will examine concentration of broadcast television and MVPD "markets." By taking a narrow approach to product market definition, I am erring on the side of overstating the degree of concentration and resulting competitive concerns.

14. Now, consider the geographic boundaries of relevant markets. As the Commission has long recognized, the single most important fact in analyzing the effects of ownership concentration on viewers and advertisers is that viewing takes place at a local level.[9] This fact implies that the relevant markets for assessing the effects of concentration on viewer choice are local.

---

7 In particular, the cable horizontal ownership limit is based on MVPD *subscribers* and thus appears to exclude broadcast television from consideration (*Horizontal Ownership Third Report and Order*, ¶ 5). In its annual assessment of competition in the delivery of video programming, the Commission identifies broadcasters as participants in the MVPD market, but then broadcasters are excluded as market participants in the calculations of market concentration. See *In the Matter of Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming*, Fifth Annual Report (*"Video Competition Report"*), released December 23, 1998, ¶¶ 95 and 128. The extent to which the Commission considers cable television channels to compete with broadcast television is even more difficult to discern.

8 For an overview of how cable and direct-to-the-home satellite television channels compete with broadcast television for viewers and advertising, see Michael L. Katz, "Old Rules and New Rivals: An Examination of Broadcast Television Regulation and Competition" (*"Katz White Paper"*), September 1999, at 52-82, submitted as an attachment to "Supplemental Comments of Fox Television Stations, Inc.," *In the Matter of 1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, submitted 18 November 1999.

9 See, for example, *In the Matter of Amendment of Section 73.3555 [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations*, Report and Order, released August 3, 1984, ¶¶ 10 and 31.

15. An examination of the data clearly demonstrates that local MVPD markets are far more concentrated than are local broadcast television markets. The vast majority of local markets have only one cable system. Direct-to-the-home satellite television provides competition, but it is limited by lack of local channels.[10] The situation in broadcast television is very different. More than half of all television markets have seven or more television stations.[11] And because markets with larger populations tend to be the ones with greater numbers of stations, the majority of television households are located in markets with 11 or more stations.[12]

16. The differences in concentration can be summarized by calculating market shares and the resulting Herfindahl-Hirschman indexes (HHIs) for local markets in cable and broadcast television.[13] The Commission, the Federal Trade Commission, and the U.S. Department of Justice all use the HHI as a measure of concentration and a rough tool for identifying markets in which the size and number of suppliers may raise competitive concerns.[14] Using national data to construct a representative local market, the Commission found that an average cable system had a market share of over 85 percent in June 1998 and the estimated HHI was 7,015.[15] As the Commission itself noted, this is far above the threshold used by the U.S. Department of Justice and the Federal Trade Commission to determine that a market is highly concentrated.

17. No broadcast station comes close to having an 85 percent market share. Table 1 illustrates the prime time shares of the affiliates of leading stations in three markets.

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10 *Video Competition Report,* ¶ 63. This disadvantage is expected to diminish as the result of legislation.

11 Warren Publishing, Inc., *Television & Cable Factbook,* Stations Volume No. 67, 1999 Edition, "Affiliations by Market," C-48 – C-51.

12 Warren Publishing, Inc., *Television & Cable Factbook,* Stations Volume No. 67, 1999 Edition, "Affiliations by Market," C-48 – C-51.

13 The HHI for a market is calculated by summing the squared market shares of the sellers in that market.

14 See, for example, *Video Competition Report,* ¶ 127, particularly footnote 562.

15 *Video Competition Report,* ¶ 128. According the Commission, cable's market share fell to 82 percent by June 1999 (*Horizontal Ownership Third Report and Order,* ¶ 29, typographical error in original).

Table 1
Prime Time Station Shares

Stations	Share of Television Households	Share of Television Viewers	Share of Broadcast Television Viewers*
New York City, #1			
WNBC: NBC	10.4	15.6	20.2
WABC: ABC	8.4	12.6	16.3
WCBS: CBS	9.0	13.5	17.5
WNYW: FOX	6.2	9.2	11.9
WWOR: UPN	3.7	5.6	7.2
WPIX: WBN	5.4	8.3	10.7
WXTV: IND	3.0	4.5	5.8
WNET: PBS	1.9	2.8	3.6
WPXN: PAX	1.4	2.1	2.7
WLNY: IND	0.5	0.8	1.0
WLIW: IND	0.5	0.8	1.0
WNJU: IND	0.4	0.7	0.9
WNJN+: IND	0.3	0.5	0.6
NY1: IND	0.2	0.2	0.3
WNYE: IND	0.1	0.1	0.1
Total	**51.4**	**77.3**	**100.0**
Indianapolis, #25			
WTHR: NBC	11.3	17.8	25.3
WRTV: ABC	7.3	11.5	16.3
WISH: CBS	10.0	15.8	22.4
WXIN: FOX	5.2	8.0	11.4
WNDY: UPN	2.3	3.6	5.1
WTTV+: WBN	5.4	8.5	12.1
WFYI: IND	1.9	2.9	4.1
WIPX: PAX	0.8	1.3	1.8
WIPB: IND	0.3	0.4	0.6
WALV: IND	0.2	0.4	0.6
WHMB: IND	0.1	0.2	0.3
Total	**44.8**	**70.4**	**100.0**
Providence - New Bedford, #50			
WJAR: NBC	12.0	18.5	34.5
WLNE: ABC	5.5	8.5	15.9
WPRI: CBS	9.0	13.8	25.7
WNAC: FOX	4.6	7.0	13.1
WLWC: WBN	2.1	3.3	6.2
WSBE: IND	0.9	1.3	2.4
WPXQ: PAX	0.8	1.2	2.2
Total	**34.9**	**53.6**	**100.0**

Source: Nielsen Media Research

* Calculated number, see text.

The three markets represent a range of sizes and are ranked 1, 25, and 50 in terms of the number of television households. All data are for May 1999.

18. Table 1 reports three measures of station shares:

- *Share of television households* (commonly known as *ratings*) refers to the percentage of television households in the station's market who viewed that station.

- *Share of television viewers* refers to the percentage of households watching television in a station's market who viewed that station. The denominator in this share calculation includes both broadcast and cable television viewing.

- *Calculated share of broadcast television viewers* is an estimate of the percentage of households watching broadcast television in a station's market who viewed that station. It is calculated by dividing the station's share of television viewers by the sum of the television viewer shares of all broadcast television stations in that relevant geographic market.

19. While one can debate whether a cable system constitutes a bottleneck asset, there is no question that a single broadcast television station does not. Any one station has too small a share of its local market. Even the largest share reported in Table 1, WJAR's share of broadcast television viewers in Providence-New Bedford, is approximately one third. Moreover, because cable channels clearly compete with broadcast channels for the majority of households, that figure—which excludes cable and direct-to-the-home satellite channels—understates the degree of competition.[16]

20. Turning to overall market concentration, one can calculate an HHI for each local market using each of the three share measures described above. These results are reported in Table 2.

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16 Further, these figures do not reflect the fact that even a station with a small viewer share often transmits a signal that reaches as many households as the leading stations in its market. To a large extent, a station's share reflects the quality of its programming, not the physical characteristics of its signal. This fact raises a

Table 2

Herfindahl-Hirschman Indexes*

Market	Basis of Calculations: Share of Television Households	Share of Television Viewers	Share of Broadcast Television Viewers
New York City	594	911	1345
Indianapolis	622	1005	1732
Providence - New Bedford	607	895	2325

* See text for discussion of calculations.

conceptual issue as to whether audience shares are a proper measure of the degree to which a station is a bottleneck. This issue is addressed below by considering various measures of capacity shares.

21. Several caveats must be kept in mind when examining the figures reported in Table 2. First—and most important—because cable and direct-to-the-home satellite channels compete with broadcast channels for the majority of households, the HHIs calculated in the final column of Table 2 dramatically overstate the degree of concentration. Second, the HHI calculations in all three columns of numbers in Table 2 are overstated for various technical reasons.[17] Nevertheless, these HHI calculations demonstrate that even taking a narrow view of the product market, broadcast television markets are significantly less concentrated than are MVPD markets at the local level. Indeed, using household or television viewing shares, all three markets fall in a range generally considered "unconcentrated" by federal policymakers.[18]

B. A Given Cable System has Much Greater Capacity than Does Any Broadcast Station

22. Today, a broadcast television station carries only one programming stream. While in the future, broadcast stations may be able to multiplex, the technology is not currently deployed.[19] In contrast, a modern cable system can carry one hundred or more channels. Almost all cable

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17 *All three measures:* Because the share data are reported for households and multi-television households may view multiple programs at one time, suppliers' calculated shares can sum to more than 100 percent. Thus, the resulting HHI calculations in all of the columns can be overstated as well.

First two measures: Ratings and television viewer shares were not available for cable channels and some broadcast stations in the three television markets. Thus, it was necessary to estimate the shares of the omitted cable and broadcast channels to calculate HHIs. This was done by assuming that as many omitted channels as possible had five percent shares. For example, the reported stations for New York City had shares totaling 77.3 percent. It was assumed that there were five omitted channels: four with shares of 5 percent each, and one with a share of 2.7 percent. Because it is extremely unlikely that any of the omitted channels had individual shares that large, this procedure leads to estimated HHIs that are too large.

Final measure: Station viewer share data were not available for some broadcast stations. Hence, they were not included in the denominator used to convert the reported stations' television viewer share into their broadcast television viewer shares. Thus, the calculated shares and resulting HHI's are biased upward.

18 See, for example, *Merger Guidelines,* §1.5. These guidelines set an HHI of 1000 as an upper bound for unconcentrated markets. For the reasons discussed in the previous footnote, an HHI calculation based on a full set of data would lead to a number less than 1000 for Indianapolis using television viewer shares as the base.

19 Even if a single station is able to broadcast multiple channels in the future, any one television station still will account for only a relatively small percentage of total broadcasting capacity in its viewing market—it's broadcast rivals will also have the ability to engage in multiplexing.

systems have 30 or more channels, and over 60 percent of systems carry at least 54 channels.[20] It follows that a single cable system has a much greater influence on program distribution than does a single broadcast station. Indeed, policymakers should take into account the fact that broadcast television stations themselves are dependent on cable system operators for carriage.

C. Cable Ownership is Much More Concentrated at a National Level

23. While viewing is local, national ownership concentration can be relevant for the analysis of competition in programming markets. The reason is that there are significant economies of scale in program production. Because of these scale economies, a program supplier has to consider the potential audience for its content on a national scale when making investment and marketing decisions. If a single owner controls a large percentage of the potential programming outlets on a national basis, it may be able to exert monopsony power.

24. The Commission's current rules allow a single owner to control cable systems serving 30 percent of all MVPD subscribers. The proposed merger of AT&T and Media One would create an entity presumably up against that limit.[21] Broadcast television ownership is much less concentrated at the national level than is cable ownership.

25. There are several ways to measure the extent to which a group owner of television stations controls a large share of access to viewers and thus might be able to exert monopsony power in the programming market. By any reasonable measure, however, any one group owner has control over only a very small portion of total broadcast television capacity and audience. Consider the following facts, each of which supports this conclusion:

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20 Warren Publishing, Inc., *Television & Cable Factbook*, Cable Volume No. 67, 1999 Edition, "Channel Capacity of Existing Cable Systems."

21 The Commission recently found that TCI (now owned by AT&T) had 26.48 percent of all MVPD subscribers in 1998, while Media One had 6.32 percent (*Video Competition Report*, Table C-3).

- *Number of Stations:* Sinclair Broadcast Group, Inc. is the largest group owner measured in terms of the number of television stations controlled. Sinclair owns fewer than five percent of U.S. commercial television stations.[22] Similarly, Fox Television Stations, Inc. owns fewer than two percent of all stations.[23]

- *Audience:* Today, Fox Television Stations, Inc. is the largest broadcast television group owner measured by national reach. Fox owned and operated stations can in theory reach 40.6 percent of all U.S. television households.[24] Their actual viewing share is considerably lower. Recently, the average rating for the 22 Fox owned and operated stations over the total day was 3.7.[25] This figure indicates that on average Fox stations were actually viewed by 3.7 percent of the households these stations reached. Hence, the 22 Fox stations collectively were viewed by 1.5 percent of television households nationwide. Prime time figures are higher, but the bottom line for policy is the same. Average prime time ratings were 7.2, meaning that Fox owned and operated stations were viewed by 2.9 percent of U.S. television households.

- *Transmission Capacity:* Another way to measure whether a group owner has bottleneck control is to calculate its share of broadcast television transmission capacity.[26] Total capacity in a given local viewing area is equal to the number of broadcast channels times the number of television households in that local market. Total national transmission capacity is then equal to the sum across all of the local viewing areas. In 1998, Fox

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22 Sinclair ownership data are provided in "1999's Top 25 Television groups," available 9 November 1999 at http://www.broadcastingcable.com/policy/policy_article.asp?articleID=692239775. The total number of stations is given in Warren Publishing, Inc., *Television & Cable Factbook*, Stations Volume No. 67, 1999 Edition, "Affiliations by Market," C-1.

23 "1999's Top 25 Television groups," available 9 November 1999 at http://www.broadcastingcable.com/policy/policy_article.asp?articleID=692239775 and Warren Publishing, Inc., *Television & Cable Factbook*, Stations Volume No. 67, 1999 Edition, "Affiliations by Market," C-1.

24 This figure represents the unadjusted reach of Fox stations (*i.e.*, the UHF discount has not been applied). This was done to take a conservative approach. "1999's Top 25 Television groups," available 9 November 1999 at http://www.broadcastingcable.com/policy/policy_article.asp?articleID=692239775.

25 Nielsen Media Research data for May 1999.

26 This is a conservative measure (*e.g.*, is weighted toward finding a competitive problem even if there is none) because it ignores competition from cable channels.

stations accounted for less than four percent of national broadcast television capacity for reaching viewers.

26. None of these figures represents an ideal measure of concentration. However, the story these data tell is so clear and consistent that there is no need to refine the measures.[27] All of the evidence points to the fact that no group owner possesses bottleneck control of access to viewers. And this conclusion would continue to hold even if the size of any group owner doubled or tripled under any of these measures.

27. Even if a single company owned one television station in each market, it would control less than nine percent of broadcast television capacity (as measured by channels times market size). If a company owned one television station in every market with eight or fewer stations and owned two stations in every market with nine or more stations (as could be allowed under the local ownership rules), it still would own less than 14 percent of total broadcast distribution capacity.

28. In contrast, if one company owned a cable system in each market, that company would own approximately 85 percent of the multichannel distribution capacity.[28] Concentrated ownership of cable systems is a much greater threat to program producers than is allowing a broadcaster to attain a broad national reach.

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[27] The Commission itself recently concluded that the "industry continues to be unconcentrated at the national level, with our estimate of the Herfindahl-Hirschman Index (HHI) still below 1000, increasing from 264 in 1996 to 308 in 1997." *In the matter of 1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Inquiry, MM Docket 98-35, released March 13, 1998, ¶ 15.

[28] *Video Competition Report*, ¶ 128.

D. There is No Evidence that any Group Owner has Exercised Market Power to Limit the Supply of Programming to its Rivals.

29. Both the broadcast television and cable television national ownership limits are motivated by concern that an excessively large owner will be able to exert undue influence or exercise monopsony power in the programming market. If a firm possessed such monopsony power, it could be expected to take actions to preserve that power. One way to do so would be to restrict the supply of programming to service providers who actually or potentially compete with the firm possessing monopsony power. In theory, a firm possessing monopsony power could demand exclusive relationships with programmers that would limit the ability of rival distributors to obtain programming. Indeed, the Commission recently found that there is "credible evidence that indicates that MSOs have used their market power to cause unaffiliated programmers to refuse to sell their programming to other MVPDs."[29]

30. I am unaware of any such allegations against broadcast television group owners. Indeed, such an allegation would make no sense—given the competitive structure of broadcast television markets, a group owner could not have the market power to exercise.

IV. SUMMARY AND CONCLUSION

31. The Commission recently found that allowing increased concentration of cable system ownership is in the public interest. This finding is one more piece of evidence that it is in the public interest to relax or eliminate the broadcast television national multiple ownership rule. If a single owner can control cable systems covering 37 percent of the population without threatening diversity or competition, it follows that allowing a single owner to control television stations reaching 100 percent of the country would not threaten diversity or competition. This

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29 *Horizontal Ownership Third Report and Order*, ¶ 59.